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REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER ON THE WORK OF ITS SIXTEENTH SESSION
(Vienna, 6 to 17 December 1993)

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). It devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359, and 371). The Working Group decided that it would be preferable to first finalize provisions for the procurement of goods and construction before elaborating such provisions for the procurement of services (A/CN.9/315, para. 25). A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and construction. The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).

2. At that twenty-sixth session, on the basis of a note on possible future work on the procurement of services prepared by the Secretariat (A/CN.9/378/Add.1), the Commission agreed to undertake work in the area and entrusted the preparation of draft model legislative provisions on the procurement of services to the Working Group. The Commission was agreed that the Working Group should finalize its work on draft model provisions on procurement of services in time for consideration by the Commission at its twenty-seventh session.

3. The Working Group, which was composed of all States members of the Commission, held its sixteenth session in Vienna from 6 to 17 December 1993. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Canada, China, France, Germany, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America.

4. The session was attended by observers from the following States: Armenia, Belarus, Bolivia, Brazil, Colombia, Croatia, Indonesia, Peru, Qatar, Republic of Korea, Switzerland, Turkey, Ukraine and Uruguay.

5. The session was also attended by observers from the following international organizations:

(a) United Nations organizations: World Bank

(b) Intergovernmental organizations: Asian-African Legal Consultative Committee, European Space Agency

(c) International non-governmental organizations: International Bar Association.

6. The Working Group elected the following officers:

Chairman: Mr. David Moran Bovio (Spain)

Rapporteur: Mr. Abdolhamid Faridi Eraghi (Islamic Republic of Iran)

7. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.37)

(b) Procurement of Services: Note by the Secretariat (A/CN.9/378/Add.1)

(c) Procurement: Draft model legislative provisions on procurement of services: Note by the Secretariat (A/CN.9/WG.V/WP.38)

(d) UNCITRAL Model Law on Procurement of Goods and Construction (Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), Annex).

8. The Working Group adopted the following agenda:

1. Election of officers;

2. Adoption of the agenda;

3. Model legislative provisions on procurement of services;

4. Other business;

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

9. The Working Group first read through the Model Law on Procurement of Goods and Construction with a view to identifying those changes that could be made to encompass procurement of services. The Working Group then reviewed the Model Law a second time discussing those changes that had been identified in more detail including various draft proposals that were presented. The deliberations and decisions of the Working Group with regard to its first reading of the Model Law are set forth below in chapter II of this report. Further deliberations and decisions of the Working Group during its second reading of the Model Law are set out in chapter III of this report. After its deliberations, the Working Group requested the Secretariat to prepare a revised version of the Model Law reflecting the deliberations and decisions that had taken place.

II. CONSIDERATION OF DRAFT MODEL LEGISLATIVE PROVISIONS ON PROCUREMENT OF SERVICES

A. General remarks

10. At the outset, the Working Group took note of the concern that elaboration of model statutory provisions on the procurement of services involved the difficult task of formulating provisions that would be in harmony with the work still to be completed within GATT in the area of free access of service providers to the Government procurement market. It was further noted that this concern had been raised when the Commission decided, at its twenty-sixth session, upon adoption of the UNCITRAL Model Law on the Procurement of Goods and Construction, to expand the Model Law to cover services.

11. There was general agreement as a working method with the approach contained in the two proposals presented to the Working Group by the Secretariat, namely, to make adjustments and additions to the Model Law with a view in the end to a consolidated text covering the procurement of goods, construction and services. At the same time, it was recognized that the exercise being undertaken by the Working Group would reveal the extent to which such an approach would be feasible, or whether, in the alternative, it would be necessary to formulate a free-standing model law dealing with procurement of services. It was also suggested that consideration might be given to incorporating some elements of the proposals in A/CN.9/378/Add.1, such as the idea of a separate chapter dealing with some aspects of procurement of services, with some elements of the proposals in A/CN.9/WG.V/WP.38, such as the addition to the request for proposals procedures of special measures for services.

12. The Working Group considered generally the scope of the services to be covered by the Model Law. In this regard, the question was raised as to whether the Model Law should exclude certain types of services that were unlikely to be obtained by procuring entities by way of the types of procedures set forth in the Model Law. Particular reference was made to personal service or employment contracts and to professional services. As regards the former, the Working Group noted that the hiring of personnel was an activity beyond the ambit of the Model Law; as regards professional services, while a view was expressed that they also fell outside of the sphere of procurement procedures of the type in the Model Law, the general view was that professional services were one of the principal categories of services to be covered by the Model Law since they comprised a significant percentage of Government procurement.

13. At the same time, the Working Group was of the view that it would not be advisable or even feasible in the Model Law to attempt to list the types of services to be covered, or to list the types of services that enacting States might wish to exclude. An attempt to make such a listing would be complicated by the fact that there were many different categories and subcategories of services, some of which might inadvertently be left out of such a listing. It was felt more appropriate to have flexibility in the Model Law, leaving it up to enacting States to define in their respective legislation the types of services to be covered. It was further generally agreed that it would be advisable for the Model Law to make provision for

enacting States to exclude certain services from among those that would fall under a general definition, rather than to provide for an inclusive listing of services to be covered.

14. It was generally agreed that all the methods of procurement currently available under the Model Law for goods and construction should also be made available for the procurement of services, though there would probably have to be greater discretion accorded to the procuring entity in selecting the procurement method used in any given case. Specific attention was drawn to the need to examine the applicability of the general rule in article 16(1) on the use of tendering proceedings. The Working Group felt that some straightforward types of services, the details of which could be specified, would be appropriate for tendering, though the majority would probably be more appropriately dealt with through the use of other methods. It was agreed that no attempt could be made in the Model Law to indicate the procurement method to be used for specific types of services, though it was suggested that some assistance in this regard might be included in the Guide to Enactment.

15. The Working Group noted that the existing procedures for all of the methods would have to be examined in order to identify the extent of any changes necessary to deal with the specific characteristics of procurement of services. For example, the question was raised as to whether it might not be appropriate to include a negotiation procedure when tendering proceedings were to be used for procurement of services, in order to accommodate the use of negotiations for the assessment of qualifications and technical capability. Furthermore, it was noted that attention would also have to be paid to the appropriateness for services of the conditions for use of methods of procurement other than tendering presently in the Model Law. For example, it was suggested that the Guide to Enactment should point out that the value-threshold for the use of certain methods of procurement might be set lower for services than for goods and construction.

16. The Working Group considered several terminological changes suggested in paragraphs 5 to 7 of A/CN.9/WG.V/WP.38. Those changes included: the replacement throughout the Model Law of the expressions "goods or construction to be procured" and the expression "goods or construction" by the word "procurement", the addition of the words "or services" in various places in the Model Law, and similar changes. The Working Group noted that at several points in the Model Law the implementation of those general drafting suggestions did not appear to provide the desired meaning or degree of clarity and that the implementation of the proposed changes would have to be reviewed on a case-by-case basis.

17. Upon concluding the above exchange of general remarks, the Working Group decided to engage in an article-by-article survey of the existing text of the Model Law with a view to identifying changes that would have to be made to encompass the procurement of services and in order to assess the proposals that had been made.

B. Title

18. The Working Group decided to consider the proposal to change the title of the Model Law to read "UNCITRAL Model Law on Procurement" after it had completed its review of possible changes to the body of the Model Law.

C. Preamble

19. It was noted that the wording of the Preamble would have to be modified to reflect coverage of services. (For further discussions see also para. 79).

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

20. As noted above, in paragraph 13, the Working Group favoured flexibility for the enacting State in determining the scope of services covered and agreed that this flexibility should take the form of a provision in the Model Law in which certain services could be excluded, either in the law itself or by way of the procurement regulations. Such an approach corresponded to the flexibility appropriate for a model law, while emphasizing the transparency that should be inherent in the process of excluding application of the Model Law. It was suggested that the Guide to Enactment should point out that some regulatory-type of body or procedure might have to be established in the enacting State with the aim of identifying those items that would be treated as services.

21. The question was raised as to whether the exclusion provision contained in paragraph (2)(b) was already suitably formulated to be applied for the purposes of excluding certain types of services. In this regard, it was suggested that that provision had been formulated more with a view to excluding entire economic sectors and, if applied to services, might inadvertently invite an undesirable degree of exclusion of services. Support was expressed for the addition of a subparagraph specifically for exclusion of services or, in the alternative, treatment of the matter in the Guide to Enactment. (For further discussions see also para. 80).

Article 2. Definitions

22. The Working Group accepted a proposal to modify the definition of procurement in article 2(a) to read as follows:

> "Procurement means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services."

23. A suggestion to shorten the definition by deleting the words "including by purchase, rental, lease or hire purchase" was regarded as one to be dealt with by a drafting group.

24. A proposal was made to add a reference to incidental services at the end of the definition of goods in sub-paragraph (c) as follows: "and includes services incidental to the supply of the goods if the value of those incidental services does not exceed the value of the goods themselves". This proposal was accepted, as it was necessitated by the need to distinguish between procurement contracts for services proper, from contracts for the procurement of goods that also contained incidental elements of services.

25. The Working Group was of the view that the Model Law should contain a definition of "services". It was felt that the need for a definition was heightened by the type of flexible approach that had been adopted with respect to the scope of the services covered. The definition favoured was along the lines of a possibility suggested by the Secretariat (A/CN.9/WG.V/WP.38, note following para. 3), namely, that the term "services" would cover products that were neither goods nor construction.

26. The Working Group agreed that the option of the enacting States to include additional categories of goods should be maintained, but that a similar option with regard to the definition of "services" would not be necessary in view of the nature of that definition. (For further discussions on article 2 see also paras. 81-83).

Articles 3 to 5

27. No comments were made on articles 3 to 5 entitled: International obligations of this State relating to procurement (and intergovernmental agreements within (this State)); Procurement regulations and Public accessibility of legal texts.

Article 6. Qualifications of suppliers and contractors

28. The Working Group adopted and referred to the drafting stage a proposal to add wording, particularly in paragraph (1)(b) (i), that would be better geared to the requirements in procurement of services, in particular professional services. It was also pointed out that, though not all the criteria in article 6 were relevant to the procurement of services, the procuring entity would, under the existing approach, only have to apply qualification criteria that were appropriate in any given case.

29. A proposal was made that paragraph (5) would need to be amended to preclude the possibility of the procuring entity establishing qualification criteria or other objectively unjustifiable criteria in the procurement of services that would have the effect of discriminating against or among suppliers or contractors on the basis of nationality. It was proposed that this could be done by adding the words "that is not objectively justifiable or that is not required by other provisions of law" after the word "procedure". A suggestion was made that this problem might already be taken care of in article 8 (1) which allowed for the limitation of participation in procurement proceedings on the basis of other provisions of law. It was however pointed out that articles 6 (5) and 8 (1) had a somewhat different focus; article 6 (5) only dealt with the setting of qualifications by the procuring entity, while article 8 (1) dealt with the larger issue of non-discrimination on the basis of nationality, except in certain specified circumstances. It was stated that it might be conceivable that even in cases where the intention was not to limit participation on the basis of nationality in the procurement of services, the procuring entity could establish qualification criteria in such a way that they had the effect of discriminating against foreign suppliers. It was stated that the procuring entity could do this by, for example, requiring suppliers to have local licenses that were not otherwise required in any other provisions of law. It was agreed that paragraph (5) should be modified to preclude such a possibility. (For further discussions on article 6 see paras 84-89).

Articles 7 and 8

30. No comments were made on articles 7 and 8 entitled: Prequalification proceedings and Participation by suppliers or contractors.

Article 9. Form of communications

31. The Working Group noted that any amendments to article 9 (2) to add those communications in procurement of services to which it would be applicable could only be made after the review of other possible changes to the Model Law.

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

32. No comments were made on article 10.

Article 11. Record of procurement proceedings

33. An observation was made that some of the provisions in article 11 were oriented to the procurement of goods or construction and did not fit well with procurement of services. As an example, it was stated that in paragraph (1) (d) the price of the tender seemed to be given a prominence that would not necessarily be appropriate in the case of procurement of services. It was agreed that a decision on whether to make any changes to article 11 could only be made after the Working Group had reviewed the remainder of the Model Law from the standpoint of covering procurement of services. (For further discussions on article 11 see also para. 92).

Articles 12 and 13

34. No comments were made on articles 12 and 13 entitled: Public notice of procurement contract awards and Inducements from suppliers or contractors.

Article 14. Rules concerning description of goods or construction

35. It was pointed out that article 14 was drafted in a manner that took into account the physical characteristics of the procurement, something that would not generally be relevant to the procurement of services. It was therefore suggested that the article should also contain wording more relevant to procurement of services. It was suggested that this might include, for example, a reference to franchises or the requirement of establishment of local offices. While the proposal was accepted, it was pointed out that the issue of establishment of local offices might have to be dealt with as a separate issue as it involved other matters such as market access. (For further discussions on article 14 see also para. 93).

Article 15. Language

36. It was pointed out that it would be necessary to mention in the Guide to Enactment that there might be a different threshold as regards what would be considered a low-value

procurement of services and what would be considered a low-value procurement of goods and construction.

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. Procurement methods

Paragraph (1)

37. The Working Group considered generally the extent to which it would be desirable or feasible to integrate the procurement of services into the approach of the existing provisions on procurement methods. A key aspect of that question was whether to apply to services also the presumption in article 16(1) that tendering was the normal method of procurement and that, in effect, any choice of another method should be justified. One view was that procurement of services should be integrated into the existing approach in the Model Law. In support of that view it was stated that the applicability to services of the rule in paragraph (1) should not be discounted as many services could be procured through tendering.

38. It was also suggested that the procurement of services in cases in which tendering was not appropriate could basically be accommodated within the existing provisions of the Model Law. It was suggested that such an approach would be in line with the approach in the Directive applicable to procurement of services in the European Community and the current revision of the GATT Agreement on Government Procurement, neither of which provided special procedures for procurement of the services covered. It was also stressed that the Model Law, already referring to seven methods of procurement, could not bear the addition of procedures of a different kind for services. It was emphasized that such an added layer of complexity would diminish transparency and jeopardize the acceptability of the Model Law.

39. A countervailing view, one which drew wider support, was that some substantial adjustments would have to be made in the existing provisions on procurement methods in order to accommodate services. According to that view, it would be inappropriate to apply the rule in article 16(1) to services as it was felt that the majority of service procurement cases would not be appropriately handled through tendering proceedings, that a focus on tendering would give undue weight to the price factor in the services context, and that generally more flexibility should be accorded to the procuring entity in selecting the appropriate method of procurement.

40. An initial question in implementing the prevailing view referred to in the previous paragraph concerned the manner in which the rule on selection of procurement methods for services should be presented. One suggestion was to have a "two-track" approach involving an additional chapter ("II bis") setting forth the rule concerning the choice of methods to be used for procurement of services, an approach aimed in particular at avoiding alterations of the existing provisions on the choice of procurement methods for goods and construction. Another approach that at this stage appeared to draw somewhat more support was to instead

add those additional provisions as separate clauses in article 16, so as to minimize the risk of added complexity.

41. Another question raised in fleshing out the details of the prevailing view in the Working Group concerned the actual extent of the flexibility to be accorded to the procuring entity in selecting the appropriate method of procurement. The Working Group noted that it would be necessary to decide whether in those cases in which tendering would be a feasible method it should be mandated or remain discretionary. A mandatory approach might use wording inspired by the approach in article 17(1) along the following lines: "unless it is feasible to formulate detailed specifications, in which case tendering proceedings are to be used, the procuring entity may ... ". In support of a more discretionary approach, which appeared to attract greater interest in the Working Group, it was stated that in some cases in which it might be feasible to conduct tendering proceedings, tendering might nevertheless not be the most appropriate method.

42. The Working Group then turned to the question of the guidance or direction to be given to the procuring entity in selecting the procurement method. A widely-shared concern was that restricted tendering and single-source procurement should remain exceptional methods. The Working Group noted that the use of those methods, along with request for quotations, for services would essentially be subject to the same restrictions presently imposed in the Model Law.

43. As was the case in the general discussion referred to above in paragraph 14, there was little support for linking specific methods of procurement to a classification or categorization of various types of services. It was noted, however, that some example or advice in this direction might usefully be provided in the Guide to Enactment. More interest was shown in a proposal to refer to the selection by the procuring entity of the procurement method most likely to fulfil the objectives set forth in the Preamble. It was suggested that such an approach would provide a normative rule in the Model Law, which could then be explained and illustrated in the Guide to Enactment. However, doubts were raised as to the utility and effectiveness of a rule that comprised merely a reference to the Preamble. It was suggested that instead an attempt should be made to include a more specific rule, such as one directing the procuring entity to select the most competitive procurement method in the circumstances. Such a formulation would refer to factors to be taken into account by the procuring entity in selecting the method (e.g., the importance of the intellectual ability or skill of the service provider for the performance of the procurement contract in question).

44. After deliberation, the Working Group decided that the rule in paragraph (1) should be reversed with respect to services, and that the selection of the procurement method should be left to the discretion of the procuring entity. That discretion, however, should be exercised within parameters based on the objectives of the Model Law.

Paragraph (2)

45. Support was expressed for the application of the record requirement in paragraph (2), though perhaps in modified form, in view of its importance in particular for supervisory bodies monitoring the procuring entity. (For further discussions on article 16 see also paras. 94-99).

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiations

46. It was noted that a discretionary approach to the selection of the method of procurement for services, which was favoured by the Working Group in its discussion of article 16, might obviate the need to formulate specific conditions for use in article 17 geared to services.

47. The question was raised as to the appropriateness or necessity of dealing with research and development contracts within the sphere of procurement of goods, as was presently the case pursuant to article 17 (1)(b) as well as article 20 (1)(e), if the scope of the Model Law were expanded to deal with services. (For further discussions on article 17 see also para. 100).

Article 18. Conditions for use of restricted tendering

48. It was generally agreed that, notwithstanding a discretionary approach with respect to the use for services of the procurement methods of tendering and the methods referred to in article 17, it would still be advisable to maintain restrictions on the availability for services of restricted tendering, request for quotations and single-source procurement.

49. In addition to noting that the wording of article 18 would have to be adjusted to reflect its application to services, the Working Group heard a cautionary view that the condition for use of restricted tendering set forth in subparagraph (a) might be more prone to abuse in the context of services than in the context of goods or construction.

Article 19. Conditions for use of request for quotations

50. The Working Group was generally in agreement that this method of procurement should be available for the procurement of services. An example that was cited was the procurement of plumbing services for repairs in a particular facility. At the same time, the Working Group noted that the wording of article 19 would need to be reviewed to make any adjustments necessary to accommodate services. It was also suggested that the Guide to Enactment should point out that the threshold value below which procurement by way of request for quotations would be available for services might be set lower than the threshold for procurement of goods.

Article 20. Conditions for use of single-source procurement

51. The Working Group agreed that in principle the provisions of article 20 were applicable to services, subject however to drafting revisions necessary to cover services. Particular reference was made in this regard to subparagraph (d) of paragraph (1), which authorized the awarding of a follow-on procurement contract to the original supplier or contractor in certain limited cases. A concern was also voiced that the circumstance referred to therein might be more prone to abuse in the context of services than in the context of goods or construction. The question was also raised whether subparagraph (d) should be limited to goods and construction, though it was recognized that analogous cases might arise in the sphere of services. It was reported that, as a safeguard against abuses that might

result from such a procedure, the procurement legislation of some States prohibited a consultant from bidding on the procurement contract consequent to the consultant's preparatory work.

52. The Working Group noted a concern that the circumstance referred to in paragraph (2) as an exceptional procedure might be particularly prone to abuse in procurement of services. It was pointed out, however, that the socio-economic cases of the type referred to in paragraph (2) would typically be well-publicized, thus mitigating the risk of abuse. It was also pointed out that the existing safeguards in paragraph (2) provided a procedure that would limit abuse. As a drafting matter, it was pointed out that the reference to article 32 (4)(c)(iii) involved text that itself needed to be reviewed from the standpoint of including services. (For further discussions on article 20 see also paras. 101-104).

CHAPTER III. TENDERING PROCEEDINGS

Article 21. Domestic tendering

53. It was suggested that the Guide to Enactment should point out that the threshold level as regards procurement of goods and construction might be higher than that for procurement of services.

Article 22. Procedures for soliciting tenders or applications to prequalify

54. It was noted that it might be necessary to add wording that would better suit application of the article to procurement of services, for example, by stating in paragraph (2) that the invitation to tender could also be published in a relevant professional publication.

Article 23. Contents of invitation to tender and invitation to prequalify

55. It was suggested that there might be a need to modify paragraph (1)(d) depending on the amendments that would be made to article 6 (1)(b). (For further discussions on article 23 see also paras. 105-109).

Article 24. Provision of solicitation documents

56. No comments were made on article 24.

Article 25. Contents of solicitation documents

57. The Working Group agreed that the wording in, for example, sub-paragraphs (d), (g) and (i) would need to be modified to accommodate the procurement of services. (For further discussions on article 25 see also paras. 110-113).

Articles 26 to 31

58. No comments were made on articles 26 to 31 entitled: Clarifications and modification of solicitation documents; Language of tenders; Submission of tenders; Period of effectiveness of tenders: Modification and withdrawal of tenders; Tender securities and Opening of tenders.

Article 32. Examination, evaluation and comparison of tenders

59. The Working Group agreed that, once a clear approach had developed as to how the procurement of services would be dealt with in the Model Law, it might be necessary to re-examine article 32(4)(c)(ii) with a view to ensuring its consistency with that approach. (For further comments on article 32 see also para. 17).

Article 33. Rejection of all tenders

60. No comments were made on article 33.

Article 34. Prohibition of negotiations with suppliers or contractors

61. It was proposed that procurement of services should be exempted from the rule in article 34 barring negotiations with suppliers and contractors. In support of that proposal it was stated that, although the rule embodied an important principle regarding procurement of goods and construction, it did not reflect a common practice in procurement of services, in particular professional services, where negotiations with suppliers and contractors would normally be held. In opposition to the proposal, however, it was stated that article 34 established a cardinal principle in procurement by way of tendering proceedings and should thus not be changed. It was pointed out that, if a procuring entity decided to carry out procurement by way of tendering proceedings, it should be made to follow the discipline inherent in that method; and, in those instances where tendering was inappropriate, the procuring entity could use one of the other methods provided for in the Model Law. After deliberation, the Working Group agreed to retain article 34 without any changes.

Article 35. Acceptance of tender and entry into force of the procurement contract

62. No comments were made on article 35.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. Two-stage tendering

63. It was suggested that the evaluation of tenders in two-stage tendering and in tendering generally, because it was of a numerical character, might not be suitable in procurement of the many services for which the evaluation criteria could not be quantified in a numerical or arithmetical form. It was, however, agreed that this was an issue that could be discussed

further only after the Working Group had further discussed the possible addition of an article specifically on procurement of services.

Article 37. Restricted tendering

64. No comments were made on article 37.

Article 38. Request for proposals

65. The starting point for the Working Group's discussion was a proposal to incorporate additional provisions into article 38 tailored specifically to the procurement of services (A/CN.9/WG.V/WP.38, paras. 9 to 11). The view was again expressed that such an approach would unnecessarily complicate the Model Law since the array of procurement methods currently available under the Model Law was already sufficiently broad to accommodate the procurement of services. The prevailing view, however, continued to be that special considerations affecting the procurement of services necessitated the elaboration of some special procedures.

66. At the same time, the Working Group was of the view that it would be preferable to establish a separate, free-standing article containing the types of procedures being proposed, rather than to attempt to interpolate them into the existing request-for-proposals procedures. It was felt that such an approach, while it would borrow substantial elements from request for proposals, would be clearer and less likely to encumber the existing procedures in the Model Law. In support of such a separate approach, it was pointed out that the existing procedures for request for proposals were predicated to a large measure on a scenario involving the procurement of goods or construction in which the procuring entity, not sure of the ultimate form of the goods or construction, would solicit various proposals for possible types of solutions. It was suggested that this was not the typical scenario in the procurement of services. A related question was whether, in the wake of the decision to establish a free-standing procedure, it would still be advisable to make available for the procurement of services also those procurement methods under article 17 that may have been included by the enacting State (two-stage tendering, request for proposals or competitive negotiation). The view of the Working Group was to make those other methods available as well.

67. An observation of a general character was made to the effect that some of the special procedures being considered might also be made applicable in other methods of procurement already available under the Model Law; for example, consideration might be given, it was suggested, to permitting negotiations in tendering proceedings when services were the subject of the procurement.

68. The Working Group then turned to a discussion of specific aspects of the proposed procedures as well as to a review generally of the extent to which the request-for-proposals procedures in article 38 could be incorporated into the separate procedure to be added for services. An initial question was whether the solicitation procedures in article 38(1) and (2) were sufficient, or whether a broader degree of solicitation should be required. Concerns cited in favour of utilizing the same type of solicitation procedure included that the article 38(1) and (2) approach was balanced and provided for an effective degree of competition,

without excessively burdening the procuring entity, and that a broader approach for procurement of services might throw doubt on the degree of competition required under article 38 for request-for-proposals proceedings. Greater interest was shown, however, in using for the procurement of services a solicitation procedure broader than the one in article 38(1) and (2). Interest in a broader approach was motivated in particular by the expectation that the special method envisaged for procurement of services would, despite the availability of other methods, probably be the main method used for procurement of services under the Model Law. It was therefore regarded as important that the solicitation procedures be sufficiently broad, so as to promote openness and competition. One suggestion in this direction was to use as a model the solicitation procedures applicable in tendering proceedings. Another, less ambitious suggestion was to include a two-track solicitation procedure of the type in article 38(2) (wide advertisement seeking "expressions of interest") as mandatory, rather than subject to an exception on the grounds of economy and efficiency, and to specify in the Model Law where notices seeking expressions of interest should be published.

69. The Working Group agreed that it would be necessary to review the evaluation criteria in article 38(3) in order to determine whether they could be mirrored in the new article or whether they might need to be modified in order to capture the elements often predominant in the evaluation of proposals for services, in particular the importance of the experience and intellectual resources, abilities and skills of the service provider.

70. The Working Group next considered the provision in paragraph (2)(a) of the proposal in A/CN.9/WG.V/WP.38 (para. 10) requiring the procuring entity, in evaluating proposals, to establish a threshold level with respect to quality and technical aspects that the proposals would have to meet in order to merit further consideration. While a question was raised as to why such a procedure would be applied to services but not to goods and construction, and why the matter might not be dealt with simply by way of prequalification proceedings, the Working Group was generally favourable to the proposal. It did, however, prefer to make the threshold procedure discretionary so as not to tie excessively the hands of the procuring entity in an area of procurement generally calling for greater flexibility.

71. Differing views were expressed as to whether it would be appropriate to provide in the special services procedure for the application of a margin of preference in favour of local suppliers and contractors. The view was expressed that this would not be necessary since the type of evaluation procedures being envisaged already afforded a sufficient degree of flexibility. It was further suggested that the margin of preference, while appropriate in the more "automatic" or "numerical" evaluation procedure in tendering proceedings, would be less well adapted to the more flexible evaluation setting in the procedures being contemplated. The prevailing view, however, was that provision should be made for the application of a margin of preference, since this would recognize the practical needs of enacting States, in particular those seeking to foster the development of fledgling services sectors of their economies. It was also pointed out that this method of favoring local suppliers and contractors would generally be more transparent than other methods to which resort might otherwise be made. Beyond the question of the margin of preference, the Working Group noted the possibility of including in the new provision, not only the evaluation criteria in article 38(3), but additional evaluation factors such as those referred to in article 32(4)(c)(iii).

72. The Working Group next turned to paragraph (3) of the proposed special evaluation procedures, that paragraph providing for the selection of the successful proposal on the basis of lowest price, highest combined evaluation of price and technical capacity, or after negotiations. It was agreed in the first place that whatever the precise selection method or criterion to be used, it would have to be predisclosed to suppliers and contractors. The Working Group endorsed the notion of providing for the selection of the successful proposal on the basis of lowest price, as well as on the basis of a combination of price and technical-capacity rating, both of which might be linked to a threshold procedure (see above, para. 70). The Working Group noted that the Guide to Enactment might usefully illuminate the policy and practical considerations that might underlie the choice of a particular selection method, including the use of the threshold technique. It was generally agreed, however, that it would not be appropriate to refer to negotiation as a third selection criterion (as found in paragraph (3)(b)(iii) of the new article proposed in A/CN.9/WG.V/WP.38, para. 10) as negotiation was not, properly speaking, a selection criterion. Rather, it was suggested, the negotiation provision should be free-standing.

73. As regards the drafting of the combined price and technical approach in the special procedures, a question was raised as to the appropriateness of referring to the "highest" combined evaluation in view of the confusion that might be caused if it were juxtaposed with the notion of the lowest price. A further observation was that perhaps it might be advisable in formulating the provision to take account of the probability that such technical factors in the context of procurement of services would, unlike the case of goods and construction, not be expressed or quantified in monetary terms. A suggestion in this regard was that the Guide to Enactment should explain that a system using "merit" points might be used in rating proposals, rather than adjusting the price to reflect the relative technical merit of a proposal.

74. The next aspect considered by the Working Group was the manner in which a negotiation procedure should be incorporated into the special procedure being crafted. The Working Group noted that the proposal before it provided for negotiation as an optional method for selecting the successful proposal, but only within the terms of one traditional approach to negotiations in the procurement of services. Under that traditional approach, negotiations concerning price take place in a serial fashion, with one supplier or contractor at a time, in the order indicated by the comparative technical and qualification rating of the proposals received. Criticism of this method was expressed, in view of the lack of competition in such an approach as regards price. The view was expressed that such a traditional approach could in many cases run counter to the objectives of the Model Law, in particular transparency and competition, and should therefore not be included. The prevailing view, however, was that inclusion of this method was probably unavoidable, but that it should only be optional and that provision needed to be made for negotiations with more than one supplier or contractor at a time in order to permit the procuring entity to obtain the benefits of competition. Furthermore, there was general agreement that provision should be made in such a wider negotiation procedure for, at the last stage, obtaining best and final offers ("BAFO") from suppliers and contractors. However, it was not determined at this stage of the deliberations what the relationship would be between such a wider negotiation procedure and selection procedures on the basis of lowest price or on the basis of a combined price and technical evaluation. (For further comments on article 39 bis see also paras. 121-143).

Article 39. Competitive negotiation

75. No comments were made on article 39.

Article 40. Request for quotations

76. It was suggested that article 40 would require some re-wording to express better its applicability to procurement of services. (For further comments on article 40 see also para. 118).

Article 41. Single source procurement

77. It was noted that article 41 might require some modification in the wording to make it better suited for procurement of services, in particular subparagraphs (a) and (d) of paragraph (1).

CHAPTER V. REVIEW

78. Articles 42-47 were found generally acceptable and applicable to the procurement of services. (For further discussions on articles 42 and 46 see also paras. 119 and 120).

III. FURTHER CONSIDERATION OF VARIOUS PROVISIONS OF THE MODEL LAW

Preamble

79. Upon a further reading of the Preamble, it was suggested that it would be necessary to change the tone of some of the wording so as to take into account procurement of services. As an example, it was suggested that, by way of making a reference to professional services, paragraph (b) could mention the promotion of the exchange of skills. While there was agreement that some of the wording, especially the reference only to goods and construction would need review, it was pointed out that the proposed change for paragraph (b) might raise issues beyond the scope of the Model Law, such as the transfer of technology.

Article 1

80. The Working Group agreed that, in order to minimize the additions to be made to the Model Law, it would be sufficient to mention in the Guide to Enactment that, under paragraph (2)(b), States had the option to exclude certain types of services as well as other types of procurement from the application of the Model Law, thereby obviating the need to add a new paragraph (2)(d) referring specifically to exclusion of certain services.

Article 2

81. Upon further consideration, the Working Group agreed that the option of enacting States to include other categories should be mentioned not only in the definition of "goods" but also in the definition of "services". It was agreed that this would enable States to more clearly differentiate between what would be considered goods and what would be considered services in their jurisdictions. A proposal to specifically provide for the exclusion of certain types of services did not receive support. It was agreed that, for the sake of transparency, any exclusions should only be carried out under article 1. It was also pointed out that the decision of the Working Group to define services as anything that was neither goods nor construction could lead to the anomalous situation of real estate being defined as a service. It was however suggested that simply excluding real estate from the Model Law would be inappropriate since in some States procuring entities used traditional procurement methods (though not necessarily tendering) at least to obtain occupancy rights in buildings. It was also noted that some legal systems classified certain rights regarding real estate as personal rights, while other legal systems classified those same rights as property rights, which could complicate the matter from the standpoint of model statutory provisions. It was agreed that the Guide to Enactment could mention that, because of its special characteristics, enacting States may wish to consider excluding acquisition of immovable property from the application of the Model Law, but that no specific exclusion would be made in the Model Law.

82. It was pointed out that, since the definition of "goods" in paragraph (2) (c) only provided examples of what could be considered goods and was not an exhaustive list, providing for the option to include additional categories in this list might lead to an inference that the list was supposed to be exhaustive. A suggestion to change the word "includes" to "means" so as to make the list exhaustive was considered unacceptable because such an exhaustive definition would place a great burden on the enacting State by having to list in the Model Law everything that would be considered as goods in its jurisdiction. It was agreed that the matter could be considered at the drafting stage.

83. The Working Group agreed that, having included the reference to incidental services in the definition of "goods", it would also be necessary to add a reference to incidental services in the definition of "construction".

Article 6

84. A proposal was made to modify article 6 (1)(b)(i) as follows:

> "(i) that they possess the necessary qualifications, professional and technical competence, financial resources, equipment....."

85. This proposal was found to be generally acceptable. It was, however, pointed out that, since the title to article 6 referred to "qualifications", another reference to qualifications in sub-paragraph (1)(b)(i) might lead to ambiguity. The Working Group agreed to refer to the drafting stage a suggestion that the problem could be solved by using the expression "necessary professional qualifications, professional and technical competence ...".

86. The Working Group then considered a proposal to amend paragraph (5) as follows:

> "Subject to articles 8(1), 32(4) and 39 bis (4), the procuring entity shall establish no criterion, requirement or procedure with respect to the requirements to be met by suppliers or contractors that discriminates against or among suppliers or contractors and against categories thereof on the basis of nationality, or that is not objectively justifiable;"

87. A suggestion was made to replace the word "or" after the word "nationality" by the word "and" so as to rule out indirect discrimination that was not objectively justifiable. This modification, however, was rejected on the basis that the wording in the proposal was necessary to convey the intended meaning.

88. A view was expressed that paragraph (5) did not make it clear whether discrimination based on the provisions of law of another State was ruled out. It was however pointed out that this was an issue that could be better dealt with under article 8.

89. After deliberation, the Working Group accepted the proposed amended version of paragraph (5), subject to possible drafting changes.

Article 7

90. The view was expressed that the formulation of the chapeau of paragraph (3), which indicated the required contents of the prequalification documents in part by reference to the requirements for an invitation to tender, should be reviewed since the provisions on prequalification proceedings were meant to have general application.

Article 8

91. A suggestion was made to add to paragraph (1) a justification for the use of nationality-based restrictions on participation that were "objectively justifiable", in order to align the text with the decision of the Working Group to add wording along those lines to article 6(5). Some interest was expressed in this proposal as a potential consequence of the decision to produce a consolidated text covering goods, construction and services. Doubts were widely shared, however, as to the necessity and appropriateness of such a change. The concern underlying those doubts was that the addition of such wording would run counter to the objective of transparency and might unnecessarily invite a greater degree of restriction on participation. It was also felt that such wording was of doubtful necessity because of the difference in function between articles 6(5) and 8(1), a difference that might need to be clarified in the Guide to Enactment. For similar reasons, the Working Group decided against a replacement of the words "other provisions of law" by the words "other provisions of law of this or any other State".

Article 11

92. It was recalled that the Working Group had noted upon its first reading of article 11 that the review of the remaining articles and proposals from the viewpoint of inclusion of

services might reveal the necessity of some modification of article 11. Having completed a first reading of the Model Law, the Working Group was satisfied that no modifications of substance were necessary in article 11. It was observed, however, that it might still be necessary to eventually make some adjustments of a drafting nature. For example, the wording of paragraph (d) (referring to price) might be modulated to reflect that price might not be identifiable in some services contexts at the time that the record is prepared. A question was also raised with regard to paragraph (i) as concerns the record requirement for the use of non-tendering methods for procurement of services, since tendering would not be the normal method under the Model Law. Lastly, it was pointed out that the use of a margin of preference pursuant to the special procedure for services would have to be reflected under paragraph (1)(e).

Article 14

93. The Working Group accepted a set of proposed drafting changes to article 14 designed to cover services. Those modifications involved: replacing in paragraphs (1), (2) and (3)(a) the words "characteristics of the goods or construction to be procured" by the words "characteristics of the goods, construction or services to be procured"; replacement in paragraph (1) of the words "and terminology, that creates" by the words "and terminology, or description of services, that create"; replacement in paragraph (2) of the words "designs and requirements shall be based" by the words "designs and requirements or descriptions of services shall be based".

Article 16

94. The Working Group considered the following proposal for a revised text of article 16:

> (1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.
>
> (2) In the procurement of goods or construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20, and, if it does, it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.
>
> (3) In the case of procurement of services, a procuring entity shall use the procedures set forth in article 39 bis, unless the procuring entity determines that:
>
> (a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the service to be provided; or
>
> (b) it would be more appropriate to use a method of procurement referred to in article 17, or, in the case of the methods referred to in

articles 18 to 20, the method in respect of which the conditions for use are satisfied.

(4) The procuring entity shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of a method of procurement pursuant to paragraph (3)(b).

95. The Working Group accepted the proposed amendments to paragraphs (1) and (2), which were intended to confine those provisions to the procurement of goods and construction, the selection of procurement methods for services being left to paragraph (3).

96. The Working Group noted that, according to the approach embodied in paragraph (3), the new special procedure for services (see below, para. 121) would be the preferred method of procurement for services. Additionally, in accordance with subparagraphs (a) and (b), other methods would be available. Under subparagraph (a), tendering proceedings would be permitted if detailed specifications could be drawn up and if tendering was determined to be the more appropriate procurement method. Under subparagraph (b), resort could be had to any of the methods under article 17 that had been included by the enacting State in its legislation if one of those methods was determined to be more appropriate by the procuring entity, or to one of the methods under articles 18 to 20, if the conditions for use for the particular method were satisfied.

97. The view was expressed that the approach in paragraph (3) was inappropriate because it permitted the procuring entity to opt for an article 17 method without having to meet any conditions for use other than a determination by the procuring entity that the use of such another method was appropriate. According to this view, the special procedure being contemplated for services (see below, para. 121) should be the exclusive method for procurement contracts involving "professional services", i.e., procurement contracts the main aim of which was to obtain the personal judgment and discretion of the service provider. According to that view, the use of the methods in article 17 would be permitted only in accordance with the conditions for use of those methods and only for procurement involving primarily the other broad category of services, referred to as "ministerial" services.

98. The prevailing view, however, was that the proposed approach should be retained. It was generally felt to be inappropriate to confine the category of professional services to the new special method. It was noted that this would cause difficulties in particular in enacting States that had limited previous experience with the types of relatively involved procedures being contemplated for the special procedure for services and that States should not be obligated to impose such a procedure in all cases. It was also generally felt to be unnecessary and probably not feasible in the Model Law to attempt to define services according to various categories. In opposition to the notion of exclusivity of use of a particular method, it was pointed out that such an approach would not be workable, for example, it would not permit the use of single-source procurement in cases of urgency. However, as a limitation on the discretion of the procuring entity, the Working Group was inclined to the view that the resort to a method under article 17 should be subject to approval. Drafting changes were suggested for paragraph (3), including the deletion of the words "case of" in the chapeau and replacement of the words "services to be provided" in subparagraph (a) by the words "services to be procured".

99. The Working Group endorsed the record requirement in paragraph (4), and decided that it should be expanded to cover also the selection of tendering under subparagraph (a). It was recognized that, due to the competitive nature of tendering, a case could be made for excluding application of the record requirement to its use for the procurement of services. It was pointed out, however, that a record requirement would assist supervisory bodies in detecting inappropriate resort to tendering by procuring entities seeking to avoid the more appropriate but perhaps more complicated special procedure.

Article 17

100. It was suggested that, in paragraph (1)(a)(i), the reference to "proposals" should be broadened to read "tenders, proposals or offers", in view of the different procurement method available under article 17. In terms of the relevance to services of the wording used for the conditions for use, it was proposed to add a separate phrase to paragraph (1)(a)(ii) referring to services along the following lines: "because of the nature of the service, it is desirable to negotiate with suppliers and contractors".

Article 20

101. In a further consideration of the suitability to services of the conditions for use of single-source procurement set forth in article 20(1), the Working Group agreed that what needed to be made clear in subparagraph (a), and analogously in subparagraph (d), was the unique or special character that a service was required to have in order to fall under the purview of those provisions. This aspect drew attention because of a concern that the types of situations referred to in subparagraphs (a) and (d) were probably more prone to abuse in the context of procurement of services than in the goods or construction context. It was noted that a wide spectrum of services was being contemplated for coverage in the Model Law, and that single-source procurement should be available for only exceptional cases. Those might include, for example, the necessary granting of a follow-on contract to the designer of customized software, or the purchase of a particular art treasure for a national museum.

102. It was generally agreed that not all purchases of art should be automatically subject to single-source procurement, since there would be instances in which a design or other artistic competition would be indicated (e.g., the purchase of art for public buildings). Mention was made in the discussion that one possibility would be for the enacting State to exclude certain categories of artistic services from the Model Law. However, the Working Group agreed that, while this possibility might be referred to in the Guide to Enactment, no mention should be made in the Model Law of an exclusion of artistic services, so as not to give undue emphasis to exclusion over competition. It was suggested that consideration should be given to dealing in the special services procedures with the use of juries in design competitions.

103. The Working Group noted that the wording of subparagraph (b) would need to be reviewed taking into account that, for services, tendering would not be the standard method of procurement.

104. The concern was expressed that, if any rewording of paragraph (2) were to be needed to encompass services, it should not have the effect of loosening what was intended to be a very exceptional procedure.

Article 23

105. The Working Group considered a proposal to add to paragraph (1)(b) the words "or the nature and place of delivery of services". This led to the consideration by the Working Group of the extent to which the notion of "place of delivery" was applicable to services. A particular concern revolved around the risk that such wording, if applied to services, might give rise to the imposition of requirements that the service provider maintain an office in the procuring entity's territory when such requirements would not be objectively justifiable, thus depressing competition. It was generally agreed that this risk of the misuse of place of delivery as an evaluation criterion should be addressed in the Model Law, though the question was raised whether the matter might not rather be addressed under article 6(5).

106. At the same time, it was pointed out that there would generally be a "place of delivery" for services that would have to be indicated to the supplier or contractor, though the degree to which the place of delivery was material might vary from case to case. For example, in the case of a consultancy contract where all that was required was the submission of a report, it might be that the place of delivery would mean merely the address to which the consultant's report would be sent. It might be relevant also in other instances, for example, in terms of the determination of the law applicable to the procurement contract. Proposals aimed at taking the above into account included adding the words "if relevant" or "if appropriate" before the words "the place of delivery of services". Doubts were raised as to the sufficiency of such expressions, since they might be too loose and since, as noted above, the place of delivery would generally be relevant to one degree or another.

107. It was further pointed out that a distinction might have to be drawn between place of delivery and place of performance. In the example given above, it might be irrelevant where the service was performed, i.e., where the report was written. By contrast, there would be procurement contracts for services where the place of performance would be relevant (e.g., a catering contract). It was suggested that the types of services likely to be procured through tendering proceedings may be more likely to be ones in which the place of performance would be relevant. Proposals along the following lines were made, aimed at taking into account the notion of place of performance: "place of development or delivery of services"; and, "place of performance or delivery, if appropriate given the nature of the services".

108. As regards paragraph (1)(c), the Working Group noted that both the notion of time of supply and the notion of time of completion might be relevant in the context of services. A proposal aimed at encompassing both notions was to use wording such as "schedule requirements".

109. After deliberation, the Working Group requested the Secretariat to revise article 23 taking into account the observations and proposals that had been made. The Working Group also noted that issues had been raised that might usefully be mentioned in the Guide to Enactment.

Article 25

110. A proposal was made to amend article 25(d) as follows:

> The nature and required technical and quality characteristics, in conformity with article 14, of the goods or construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction or services are to be effected; and the desired or required time when the goods are to be delivered or the construction or services are to be effected.

111. It was suggested that, in the proposal, the existing reference to incidental services had been deleted. The Working Group, however, agreed that such a reference, having been retained in the definition of goods, should also be retained in paragraph (d). The proposal was otherwise generally acceptable.

112. The Working Group also considered a proposal to add a sentence at the end of paragraph (i) to read as follows: "For services, this provision shall be applied by analogy". Although the Working Group agreed with the substance of the proposal, it was felt not appropriate to use a formulation such as "by analogy". It was agreed that the intention was to apply the examples given in paragraph (i) to services where applicable, and that adding the words "any applicable" before the word "transportation" might result in a better formulation.

113. The view was expressed that, since it was difficult to envisage alternative tenders in procurement of services, paragraph (g) should only apply to the procurement of goods and construction. It was, however, generally felt that it might be possible to have alternative tenders, even for services in the context of tendering, and that therefore the possibility should not be excluded from the Model Law.

Article 28

114. A proposal was made to add a sentence at the end of paragraph (5)(b) along the following lines:

> Such other form may also be used in order to provide a sufficient degree of confidentiality with regard to particular services, as, for example, area planning, architecture and civil engineering or data processing.

115. It was explained that this proposal was aimed at providing for confidentiality in cases in which a part of the tender would be submitted in the form of a model as would normally happen with the examples given. It was explained that, in most of such cases, the tender would have an artistic component and that selection of the successful tender would be done by a jury. The Working Group, however, agreed that, although there indeed might be a problem with regard to the confidentiality of models, it would not be appropriate to make any changes to paragraph (5)(b), which focused on the issue of submission of tenders by electronic data interchange (EDI) and other similar technologies. It was suggested the matter

of confidentiality might be considered adequately addressed by article 32(8) on non-disclosure of information regarding tenders.

Article 31

116. It was suggested that tenders for services would, in most instances, contain information beyond the price of the tender and that article 31(2), which provided that all suppliers and contractors should be permitted to be present at the opening of the tenders, would compromise the confidentiality of such information. The Working Group felt, however, that article 31 embodied an important rule for purposes of transparency in tendering proceedings and that it should therefore remain unchanged. Furthermore, it was noted that, in accordance with paragraph (3), only the addresses of the suppliers or contractors and the prices of the tenders would be announced to those present.

Article 32

117. It was suggested that the non-price factors mentioned in article 32(4)(c)(ii) would not generally be applicable to procurement of services. One suggestion to deal with this problem was to differentiate clearly in the sub-paragraph those factors that would be applicable only to goods and construction from those that would be applicable also to services. Another suggestion was to add wording to make it clear that the intention was to apply only some of those factors to services. It was agreed to leave the matter to the drafting stage.

Article 40

118. It was pointed out that the wording in paragraph (1) referring to transport and other charges should be aligned with the approach agreed on by the Working Group relative to services in other similar provisions.

Article 42

119. The Working Group agreed that there would be a need to add to article 42 those aspects of the new procedures for procurement of services that would be exempt from review. It was suggested that these could include the decision to reject all proposals. It was, however, agreed that this type of modification of article 42 could only be done comprehensively after finalization of all the provisions on procurement of services.

Article 46

120. A view was expressed that the possibility of suspension of the procurement proceedings should be excluded for some services, especially in those instances where it would be harmful to the procuring entity for the provision of the services to be delayed or discontinued even for a short period. It was pointed out, however, that suspension of the procurement proceedings was a procedure that was available only under the conditions specified in article 46 and that was subject to avoidance by the procuring entity, in accordance with paragraph (4), by way of a certification that urgent public interest required that the procurement proceedings not be suspended.

New article on special procedures for procurement of services

121. Subsequent to its discussion of article 38 (see paras 65-74), the Working Group considered the following text of a new article setting forth special procedures for procurement of services:

Article 39 (bis). Request for proposals for services

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing an invitation for proposals or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation for proposals or to prequalify is to be published).

(2) The invitation for proposals or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation.

(3) Notwithstanding the provisions of paragraph (1) and (2) of this article the procuring entity may:

(a) where the services to be procured are available only from a limited number of suppliers or contractors, solicit proposals only from those suppliers or contractors; or

(b) where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, solicit proposals from a sufficient number of suppliers and contractors to ensure effective competition.

(4) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative qualifications, experience, reputation, reliability, professional and managerial competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) the price submitted by the supplier or contractor for carrying out its proposal including any ancillary or related costs;

(d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of (this State), the extent of participation by local suppliers and contractors, the

encouragement of employment, the economic development potential offered by the proposal, the development of local experience, (... (the enacting State may expand sub paragraph (b) by including additional factors));

(c) if authorized by the procurement regulations (and subject to approval by .. (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of proposals by domestic suppliers or contractors which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the services to be procured and the location where the services are to be provided;

(c) the factors to be used by the procuring entity in determining the successful proposal, including any margin of preference and any factors to be used pursuant to paragraph (4)(d) of this article and the relative weight of such factors; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(6) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the procurement proceedings.

(7) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(8) In evaluating proposals in the procurement of services, the procuring entity shall apply only the criteria referred to in paragraph (4) of this article.

(9) The procuring entity, in ascertaining the successful proposal may use any of the methods provided for in paragraphs (10), (11) and (12) of this article.

(10) (a) The procuring entity may establish a threshold level with respect to quality and technical aspects of the proposals and, without considering the price of the proposals, rate each proposal in accordance with the factors for evaluating the proposals as set forth in paragraph (4) of this article and the relative weight and manner of application of those factors as set forth in

the request for proposals. The procuring entity shall then compare the proposals that have attained a rating at or above the threshold level.

(b) The successful proposal shall then be:

(i) the proposal with the lowest price; or

(ii) the proposal with the highest combined evaluation of the price and of technical capacity as rated in accordance with subparagraph (a) of this article.

(11) The procuring entity may engage in negotiations with suppliers and contractors. Such negotiations shall either:

(a) be carried out in accordance with paragraphs (7), (8), (9) and (10) of article 38; or

(b) be carried out in accordance with paragraph (12) of this article.

(12) (1) Any negotiations pursuant to paragraph (11)(b) of this article shall be confidential.

(2) Subject to article (11), one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(3) The procuring entity shall:

(a) establish a threshold level in accordance with paragraph (10)(a) of this article;

(b) invite for negotiations on the price or other aspects of its proposal the supplier or contractor that has attained the highest rating in accordance with paragraph (10)(a) of this article;

(c) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(d) inform the other suppliers or contractors that they did not attain the required threshold level;

(e) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (12)(3)(b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second highest rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

Title

122. The Working Group was sympathetic to the concern that the proposed title of the provision might not indicate with sufficient clarity that the procedures to follow were independent and separate from the procedures under article 38 for request for proposals. Several proposals were adduced including: to retain the present title, but to rename article 38 "Request for proposals for goods or construction"; to rename the new provision "Call for expressions of interest"; and to rename it "Special procedures for request for proposals for services". The greatest degree of interest was shown in the latter proposal, as it was felt to highlight the character of the provision as special for procurement of services and to avoid alteration of the existing title of article 38. The Working Group requested the Secretariat to consider the matter further prior to the next session, and decided to include provisionally, in square brackets, both the existing title and the preferred alternative.

Paragraphs (1), (2) and (3)

123. The Working Group next considered the solicitation procedures set forth in the above paragraphs of the proposed new article. It noted that the proposed text, in paragraphs (1) and (2), required a wider solicitation procedure, one patterned essentially on the solicitation requirements for tendering proceedings, and that paragraph (3) provided for limited solicitation in a manner based substantially on the requirements for restricted tendering.

124. A spectrum of views and concerns were expressed as regards the above solicitation procedures. On one end of the spectrum was the view that the proposed extensive solicitation requirements should be retained because they reflected that the new procedure was intended to be used in the bulk of service procurement and were therefore necessary to promote the objectives of the Model Law. It was pointed out in this regard that the procedures set out in paragraphs (1) and (2) only involved the publication of the notice of the procurement and not the solicitation documents themselves. On the other end of the spectrum was the view that the proposed solicitation requirement placed an excessive, unrealistic burden on the procuring entity, thus causing inefficiency in procurement. In support of that view, it was stressed that the imposition of a wide solicitation requirement would in some cases have an anti-competitive effect, since it would cause suppliers or contractors to refrain from participating in procurement proceedings in view of the low mathematical chance of being selected and the high cost of preparing proposals. It was also observed that, even where a threshold rating was applied to reduce the number of proposals to be finally considered, some degree of consideration or evaluation was involved. It was further pointed out that precisely because of such considerations professional services were traditionally procured through the use of a limited solicitation procedure. This point prompted the observation that the scope of the services to be covered would extend beyond merely

professional services. In response to that observation, it was suggested that the bulk of such other services might anyway be procured through tendering proceedings.

125. A third line of approach, occupying to some degree a middle ground between the two views cited above, involved in one form or another an attempt to determine the extent of the solicitation requirement according to the value of the procurement contract. This type of approach would be aimed at avoiding the imposition of complicated procurement procedures for routine, low-value service contracts that did not justify the use of such procedures. One method of accomplishing this end might be to point out in the Guide to Enactment that low-value service contracts might be excluded by the enacting State by way of article 1(2) of the Model Law. It was suggested that another, more targeted way of achieving the same result, without necessarily excluding the entirety of the Model Law, would be to add a provision specifically excluding the broad solicitation requirements in the case of low-value service contracts.

126. Faced with the above spectrum of views, the Working Group felt that it would be desirable to engage at the next session in further deliberations on the question of the extent of solicitation requirements. Accordingly, it requested the Secretariat to prepare for that session variants reflecting the views that had been presented. In addition to the views that had been expressed on the basic question of the extent of the solicitation requirement, the Working Group noted several other observations that were made, some of which might be reflected in a future draft. They included that: the public solicitation procedures should not preclude the procuring entity from additionally engaging in direct solicitation; consideration should be given to providing that no right to have a proposal evaluated was conferred by virtue of the solicitation procedures; mechanisms should be included in the Model Law, or at least mentioned in the Guide to Enactment, to ease, where appropriate, the burden imposed on the procuring entity; for example, a three-stage evaluation process might be relevant, the first stage of which would be a quick check as to whether proposals met certain mandatory requirements; the provisions in paragraph (3)(a) should mirror more closely the strict corresponding rule for restricted tendering, namely, by requiring solicitation in the cases concerned from "all" suppliers of the service in question. A variant of the latter proposal was to require solicitation in such cases from "all known" suppliers or contractors so as to avoid placing excessive research tasks on the procuring entity, though the practicability of that proposal, along with that of the proposal to add only the word "all", was questioned.

Paragraphs (4) and (5)

127. A proposal was made to re-order the paragraphs in article 39 bis so as to better reflect the actual sequence in which the various procedures would take place. It was, for example, suggested that the current paragraph (5), on the contents of the request for proposals, should follow paragraph (3) on solicitation procedures. It was agreed to leave this matter to the drafting stage.

128. It was pointed out that one issue that arose in the provision of most professional services was the eligibility of the supplier or contractor in providing the services because of licensing requirements. It was however suggested that, though the issue of eligibility might be important to include in paragraph (4)(a), it was different from the question of licensing, which had more to do with qualification and which was dealt with under article 6. There

was general agreement that paragraph (5) should provide that any eligibility requirements should be notified in the request for proposals.

129. A proposal was made that the last sentence of the chapeau to paragraph (4) should end with the word "only". It was explained that the intention was to limit the procuring entity to applying only those criteria mentioned in paragraph (4). It was, however, pointed out this would not be appropriate because the criteria in paragraph (4) might not be all encompassing and, because the procuring entity might wish to apply additional criteria, it should be entitled to do so as long as the additional criterion was not discriminatory. It was agreed that the crucial requirement in this regard was that, in accordance with paragraph (5), the procuring entity should pre-disclose to all suppliers and contractors the criteria it would apply and also the method to be used in the selection of the successful proposal.

130. Other proposals of a drafting nature included the following: that the word "responsibility" should be added to and the word "relative" deleted from paragraph (4)(a); that in paragraph (4)(b) the words "effectiveness of the proposal" might not correctly capture the requirement that the proposal was intended to address; and that the word "reflected" in paragraph (4)(e) should be replaced by the word "included". It was also noted that the language in paragraph (5)(b) regarding the location where the services were to be provided should be aligned with the language agreed on for the other similar provisions (see paragraphs 105-107).

Paragraphs (6) to (10)

131. It was pointed out that paragraphs (8) and (9) should make it clear that, in evaluating and ascertaining the successful proposal, the procuring entity should only use the criteria and method of selection that had been notified to the suppliers and contractors in the request for proposals.

132. Another issue raised in regard to paragraph (9) was that, though it referred to the methods of ascertaining the successful proposal as set out in paragraphs (10), (11) and (12), paragraph (12) was not actually being presented as a separate method, but only set rules for negotiations in accordance with the method in paragraph (11)(b). It was therefore agreed that paragraph (11)(b) should be moved to paragraph (12).

133. It was suggested that there should be a general provision allowing for pre-evaluation negotiations, even in cases where the procuring entity intended to select the successful proposal by using the method provided for in paragraph (10). It was stated that such negotiations would be useful in enabling the procuring entity and the suppliers and contractors to arrive at a common understanding of the requirements of the procuring entity. It was, however, pointed out that it might not be appropriate to allow for pre-evaluation negotiations as this procedure could be open to abuse. It was agreed that a better alternative would be to establish in article 39 bis that the procuring entity could convene a meeting similar to the one provided for in article 26(3), at which clarifications on the request for proposals could be made.

134. A view was expressed that the threshold established under paragraph (10)(a) was not relevant to those cases where the procuring entity would select the successful tender on the

basis of a combined evaluation of the price and technical aspects of the proposal in accordance with paragraph (10)(b)(ii). It was, however, pointed out that, even in such cases, the threshold would be of use to the procuring entity because it would limit the risk of selecting a proposal with an attractive price but of very low technical merit.

135. It was pointed out that a common practice in the evaluation of services was to use a two-envelope mechanism so as keep the technical aspects of the proposals separate from the price and to reveal the prices only after the technical evaluation was completed. It was stated that this was an important mechanism for avoiding the possibility of the price influencing the technical evaluation and that, although this separation was alluded to in paragraph (10)(a), it was important to make it clearer.

Paragraphs (11) and (12)

136. The Working Group was favourably disposed to including in the Model Law the various types of negotiation and evaluation procedures set forth in paragraphs (11) and (12). The former provision provided for selection of the lowest price proposal, or of the best proposal on the basis of a combined price and technical rating, while paragraph (12) provided for selection of a proposal after negotiations with the highest technically rated supplier or contractor. It was suggested that the fact that paragraphs (11) and (12) presented alternative paths for the procuring entity needed to be made clearer. Particular emphasis was also placed on the need to make it clear that the request for proposals should predisclose the type of evaluation and selection approach to be used by the procuring entity.

137. By way of general remarks, the Working Group was urged to consider whether the totality of the various evaluation and selection methods presented should suffice to make the new special article the sole method for procurement of services, other than for those services that could be procured through tendering, request for quotations or single-source procurement. It was suggested that such an approach would be more focused and simpler to apply for the procuring entity than the approach currently agreed under article 16(3). It was said that the new article would contain the essential features in particular of request for proposals and competitive negotiation, thus obviating the need in article 16(3)(b) to make available to the procuring entity a potentially confusing or complicated range of choices of procurement methods. However, the Working Group agreed that the new article should not be a substitute for two-stage tendering, request for proposals, or competitive negotiations.

138. As regards the content of paragraph (11), the Working Group expressed a preference in subparagraph (a) for avoiding the use of the cross-reference method of incorporating the negotiation procedures, including the BAFO process, from request for proposals. It was felt that a clearer distinction would be drawn between the new special article on services and the provisions on request for proposals for goods and construction if those negotiation procedures were to be restated in the new article. It was also suggested that the cross-reference to article 38(9) was not appropriate since slightly different evaluation criteria were provided in the new provision. Another suggestion was that subparagraph (b) should form a unit with paragraph (12), rather than being a part of paragraph (11). A further suggestion was that, due to the length of the proposed new article, consideration might be given to presenting in a separate article paragraph (12), which it was incidentally remarked needed to be renumbered to accord with the style used in the Model Law. A last point made with

regard to paragraph (12) was that it should refer in paragraph (3)(b) to the negotiation of a "reasonable" price.

139. In the discussion of paragraphs (11) and (12), several speakers alluded to the lack of an express provision providing for the rejection by the procuring entity of all proposals, akin to the provision set forth in article 33 for tendering proceedings. It was agreed that such a right to reject all submissions was an important right that should be available for all procurement methods. The Secretariat was therefore requested to present to the Working Group at its next session a draft of a provision on the matter, to be included in chapter I. The Working Group was motivated by the concern that a mention of the right to reject all submissions in the new article might leave the unintended implication that such a right was present only for those methods in which it was mentioned expressly. At the same time, the Working Group stressed that amendments to the Model Law at the present point should be kept to a clear minimum and that the only amendments that should be considered were amendments that resulted from the expansion of the Model Law to cover services and that would improve the text, without altering its principles.

140. Various suggestions were proffered as to the content of a general provision on rejection of all submissions. One suggestion was that a clear distinction should be drawn between the rejection of all submissions on the basis of a qualitative assessment and the rejection of all submissions pursuant to a change in policy or attributable to a budgetary shortfall. Another view was that it would be preferable not to make any such distinction, but to refer to rejection of all submissions "if it is in the public interest to do so". A further view, more in the latter direction, was that the present formulation of article 33 should be retained in crafting the new general provision. The Working Group was also reminded that a line might somehow have to be drawn between the period of time during which the rejection of all submissions would be permissible and the point of time when the procuring entity would be required to conclude a procurement contract. Lastly, there was broad agreement on two points: that the right to reject all submissions should be subject to the prior disclosure in the solicitation or analogous documents, and that the exercise of the right should be exempt from review under article 42, as was presently the case with article 33.

141. Another question that came up in the discussion of paragraphs (11) and (12) concerned the extent to which any provisions should be included in particular on the formation of the contract that would emerge from the negotiations or other method of selection employed under the new procedure. It was generally agreed that more needed to be said about the contract than was presently the case, bearing in mind that the new procedure was designed to be the principal method for the procurement of services. It was agreed that the rules set forth for tendering proceedings in article 35 should generally be applicable to the new procedures for services, an end that might be achieved by way of a cross-reference. The Working Group was also strongly urged to include a requirement that the request for proposals for services should include a copy of the form of the contract to be signed. It was suggested that this would help to protect the interests of the public purchaser, since contracts drafted by the supplier or contractor would naturally not be drawn up from the primary perspective of the interests of the public purchaser. Support was expressed for the suggestion, though it was questioned whether a preferable, more flexible approach might not be to mention the procedure as an option.

142. Some interest was also expressed in the possibility that it might be appropriate, in the light of the addition of the new procedures, to attempt to include in chapter I a provision on formation of contract applicable to various methods of procurement. Hesitation was expressed as the proposed inclusion of a general provision on formation of contract. It was recalled that the decision to include a provision on contract formation only for tendering proceedings had been a conscious one, thus leaving that matter, in the case of other procurement methods, to the applicable contract law. It was noted that, because of the variable circumstances and less formal procedures involved in some of those other methods, it might be difficult to draft a meaningful general rule. The Working Group did decide, however, to consider the matter on the basis of an assessment by the Secretariat of the feasibility of a general provision, to be presented to the next session.

143. After deliberation, the Working Group requested the Secretariat to revise the new procedures, taking into account its deliberations and decisions. The Working Group also noted the view of some delegations that it would be preferable to attempt to reintegrate the special procedures for services into article 38.

IV. OTHER ISSUES

144. It was suggested that either the Model Law or the Guide to Enactment should include some discussion with respect to the techniques and practice of rating tenders, proposals or offers with a view to avoiding inappropriate or corrupt application. A suggestion was also made that there should be a provision in article 39 bis giving some direction to the procuring entity as to the machinery of Government appropriate for ascertaining the successful proposal, including how to carry out the ratings. It was however pointed out that a similar proposal had been made during the Commission's deliberations on the Model Law and had been rejected as going too far in dictating to enacting States how to organize their internal governmental machinery.

145. The Working Group also considered a proposal to provide in article 39 bis that the successful proposal could be selected by way of a design contest. It was pointed out that this was a method that was commonly used in the evaluation of proposals that had an aesthetic content. It was stated such a provision could deal with such issues as the composition and impartiality of the selecting jury or panel, and that such a selection process should be limited to the aesthetic component of the proposal. It was also pointed out that such a provision would only be appropriate where the jury makes the award or provides a decision that is binding on the procuring entity. It was agreed that the draft of such a provision would be presented to the next session of the Working Group for discussion. A concern was expressed, however, that such a provision should not be drafted in such a manner as to lead to the conclusion that the use of design contests was limited to procurement of services. It was also suggested that the use of the word "jury" or "juries" should be avoided in view of the differing connotations that it might have.

146. A concern was expressed that, in defining procurement as "acquisition by any means", the question would arise as to whether the Model Law was intended to cover services that were provided to public entities free of charge. The Working Group was of the view that, beyond raising the issues of lobbyists and consultants that would be paid for by

third parties, and beyond the possibility that services might be provided to governments for free or for altruistic purposes, the question concerned the legislative framework that regulated government ethics and went beyond the provisions of article 13 of the Model Law on inducements from suppliers and contractors. The Working Group agreed that it would be sufficient to deal with the problem by making it clear that the Model Law regulated acquisition in return for payment. A view was expressed that this might be accomplished by using an expression along the lines of "acquisition for compensation".

147. A question was also raised regarding the definition of "goods" as earlier agreed on by the Working Group. It was noted that this definition only gave examples of objects that could be regarded as goods and provided the enacting State with the option of adding to the list of examples. It was suggested that, considering that the definition of "services" included everything that was neither goods nor construction, it would be preferable to have a definitive definition of goods, so as to avoid two open-ended definitions. It was therefore suggested that a definition of goods could provide as follows:

> "Goods" means objects of every kind and description including raw materials, products, and equipment, and objects in solid or gaseous form, and electricity and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves.

148. The Working Group decided to consider this proposal further at its next session.

149. The view was again expressed that, considering that the present formulation of article 39 bis included various methods that involved negotiations, including negotiations as provided for under article 38, it should be possible to limit procurement of services to be carried out only by means of either tendering or article 39 bis. It was pointed out that this would have the benefit of simplifying the Model Law by precluding the availability of all the other methods and also article 39 bis for procurement of services. A view was expressed that the Working Group would have another opportunity to review the matter at the next session.

150. It was also suggested that the Secretariat should consider where the new article should be located, bearing in mind that it would now provide the preferred method for procurement of services.

151. A view was expressed that the Guide to Enactment should mention that, as an enacting technique, some States may consider putting the general principle in the law itself and leaving the more detailed rules for the procurement regulations.

V. FUTURE WORK

152. Views were strongly expressed that there would be need to hold an additional meeting of the Working Group so as to consider the outstanding issues before presenting a final draft text to the Commission at its twenty-seventh session. It was noted that the next session of the Working Group was scheduled to be held in New York from 14 to 25 March 1994. It

was stated that it would otherwise be impossible to report to the Commission on the basis of the work done at the present session.

153. A suggestion was also made that consideration should be given as to how the Model Law should be presented in its final form. In this regard, support was expressed for presenting a consolidated text including both the Model Law and the Guide to Enactment in which the articles of the Model Law would be followed by the sections of the Guide in which they are discussed. It was also noted that a list of the amendments to the Model Law to cover services would be a useful tool for States that had already adopted legislation based on the Model Law. It was, however, pointed out that the form in which the final text of the Model Law will be presented was dependent on the availability of sufficient financial resources.